

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LISA J. JEWELL

Claimant

VS.

SPECIALTY HOSPITAL OF MID-AMERICA

Respondent

AND

ACE AMERICAN INSURANCE COMPANY

Insurance Carrier

Docket No. 1,062,706

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 23, 2014, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on October 14, 2014. Ronald L. Edelman of Kansas City, Missouri, appeared for claimant. Kevin Johnson of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant's July 31, 2012, work accident was the prevailing factor in causing her sacroiliac (SI) joint injury, but it was not the prevailing factor in causing injury to claimant's lumbar spine. The ALJ determined the record failed to prove any permanent impairment due to claimant's SI joint condition. Moreover, the ALJ found claimant not entitled to future medical treatment, though she is entitled to reimbursement of \$500 for unauthorized medical expenses.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues the uncontroverted medical evidence shows her work accident was the prevailing factor in causing her injury, medical condition, and resulting impairment. Further, claimant contends the evidence shows she suffered permanent impairment as a result of her work injury, and she is entitled to future medical treatment.

Respondent maintains the ALJ's Award should be affirmed in all respects.

On August 1, 2014, respondent filed with the Board a Motion to Strike Claimant's Brief stating claimant impermissibly integrated evidence and information into her brief that was not part of the record. Claimant responded on August 12, 2014, noting K.S.A. 60-409 allows judicial notice of statutes. Claimant also argued the appended Board decision attached to claimant's brief was intended as a cite to legal authority and not as evidence.

The issues for the Board's review are:

1. Should claimant's brief be stricken?
2. Was claimant's work-related accident the prevailing factor in causing her injuries, medical conditions, and resulting impairment?
3. What is the nature and extent of claimant's impairment?
4. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant started working for respondent as a registered nurse in April 2007. Her duties included total care of patients. Claimant described total care as assisting with ambulation, feeding, medications, hygiene and other daily needs. Claimant also assisted with lifting and transferring patients. On the morning of July 31, 2012, claimant and six others lifted a large patient from a hospital bed and transferred him to a cardiac chair. Claimant testified she felt pain in her low back beginning approximately an hour following the lift. Claimant stated she attributed her back pain to the lifting episode, as she had not performed any other activity that would cause back pain.

Claimant reported her back pain to Lee Vanier, director of nursing and her supervisor, that afternoon. Claimant indicated she continued working her regular duties until she was able to speak with Mr. Vanier, and her back pain became progressively worse during that time. Mr. Vanier directed claimant to complete an incident report. Claimant testified both Mr. Vanier and Jim Haggerty of human resources had left by the time she completed the paperwork; therefore, she did not request medical treatment at that time.

Claimant went on her own to the St. Joseph Medical Center emergency room early the following morning, where she was given a prescription and light duty restrictions. Claimant gave the restrictions to Mr. Haggerty immediately following her discharge. Mr. Haggerty referred claimant to OHS CompCare, where she received therapy and underwent an MRI. Claimant continued to have symptoms and was referred to Dr. John Ciccarelli.

Dr. Ciccarelli, a board certified orthopedic spine surgeon, first treated claimant on September 4, 2012. Claimant provided a history of her work-related accident with increasing pain in her low back and left SI region. She also mentioned some occasional prior back pains. Dr. Ciccarelli noted these pains were not chronic in nature but would improve with time and sleep. He also reviewed claimant's available MRI, finding claimant "had some mild degeneration about the L4-L5 region and then a broad-based bulge of the disk, but that was not really causing any significant nerve root compression."¹ Based on the MRI and his findings upon physical examination, Dr. Ciccarelli concluded additional therapy, a muscle relaxant, and light duty restrictions were preferable to surgery. Dr. Ciccarelli testified the MRI did not show any traumatic or acute injury, and he determined claimant had normal age-related changes to her spine.

Claimant returned to Dr. Ciccarelli on October 16, 2012, after completing a course of physical therapy. Dr. Ciccarelli noted claimant's low back and SI joint pain had improved, but she began having symptoms of pain radiating toward the left leg. Claimant was given an epidural injection due to her change in symptoms. She returned to Dr. Ciccarelli for follow up on November 6, 2012, and reported some very short-lived relief before her pain returned. After discussion of various options, claimant decided to undergo surgery.

Dr. Ciccarelli described the procedure he performed on December 5, 2012:

We basically performed a decompression of the L4-5 level, which involved us going in and performing a laminectomy, or removing some of the bony roof of the spinal canal, which allowed us to trim away some of the tightness that she was having on the nerves; and after that inspected the small disc bulge, which was really not compressive following removal of the bone spurs, and essentially stopped with the decompression and did not have to further sacrifice the disc.

Claimant testified she felt a pop in her back shortly following surgery although she had not suffered another accident. Claimant continued to see Dr. Ciccarelli for her postoperative care until he released her at maximum medical improvement (MMI) on March 21, 2013. Dr. Ciccarelli noted claimant experienced a good resolution of the majority of her leg pain symptoms, though she continued to have sporadic tingling in the left buttock area. He testified most of claimant's symptoms were ongoing myofascial soreness around her back and SI joint region, which is not uncommon following surgery. Dr. Ciccarelli stated he anticipated claimant's symptoms would improve with time.

¹ Ciccarelli Depo. at 7.

In a letter dated April 11, 2013, using the *AMA Guides*,² Dr. Ciccarelli opined claimant sustained a 10 percent permanent partial impairment of the body as a whole secondary to the lumbar decompression discectomy. Dr. Ciccarelli testified claimant does not fit any of the *AMA Guides*' criteria for loss of motion segment integrity. Dr. Ciccarelli stated loss of motion segment integrity was a significant abnormal disc motion, which claimant did not have. He also noted in his letter that as of claimant's MMI release, claimant had no formal work restrictions.

Dr. James Stuckmeyer, a board certified orthopedic surgeon, examined claimant on May 22, 2013, at her counsel's request. Claimant complained of ongoing symptoms of low back pain, with a radiating pain into the left buttock region and difficulties with prolonged standing, walking, lifting, bending, and twisting. She told Dr. Stuckmeyer her overall condition was worse than it was prior to the December 2012 operation. Dr. Stuckmeyer reviewed claimant's history, medical records, and performed a physical examination. Dr. Stuckmeyer opined claimant was not at MMI, and he recommended she undergo a postoperative MRI with contrast of the lumbar spine. Dr. Stuckmeyer wrote:

In summary, I feel within a reasonable degree of medical certainty that as a direct, proximate, and prevailing factor of the accident occurring on July 31, 2012, while [claimant] was employed with [respondent], she sustained a significant injury to her lumbar spine.³

Claimant returned to Dr. Ciccarelli on July 9, 2013, with a return of symptoms. Dr. Ciccarelli provided additional conservative treatment and ordered a new MRI of claimant's lumbar spine. Claimant returned to Dr. Ciccarelli on August 15, 2013, following the MRI scan. Dr. Ciccarelli noted the MRI revealed no further nerve compression or further herniation causing any nerve issues. He did not recommend any further surgical intervention, but instead suggested claimant have an epidural injection on September 12, 2013. Claimant reported no relief from the injection.

Claimant's last visit with Dr. Ciccarelli occurred September 26, 2013. Dr. Ciccarelli felt claimant had again reached MMI, as he did not anticipate any new or worsening symptoms associated with her spine or stenosis problem. He testified his impairment rating had not changed since April 11, 2013, and he did not anticipate claimant requiring future medical care.

Dr. Stuckmeyer reviewed claimant's additional records from Dr. Ciccarelli and agreed no additional surgical intervention was warranted. In a report dated October 19, 2013, Dr. Stuckmeyer opined claimant would require additional pain management for her

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ Stuckmeyer Depo., Ex. 2 at 5.

ongoing symptoms, including epidural and potentially facet injections. Dr. Stuckmeyer testified the reason for claimant's ongoing symptoms is the existence of scar tissue. He stated if the scar tissue is removed, it will reform. Dr. Stuckmeyer added, "So she's really in an end-stage situation other than referral to pain management from a surgeon's standpoint."⁴

In his October 19, 2013, report, Dr. Stuckmeyer opined:

Utilizing the [AMA Guides], Section 1.3, Table 72 on page 310, I would assess the patient as having a DRE-Impairment Category V.

As outlined, the patient has undergone a two-level decompressive procedure which would represent loss of motion segment integrity, and the patient does have ongoing postoperative radicular symptoms into the lower extremity. This would equate, in this examiner's opinion, to a 25% whole person impairment.⁵

Dr. Stuckmeyer later testified claimant's 25 percent impairment is also related to her SI dysfunction, which is a "real orthopedic diagnosis" but is not mentioned in the AMA Guides.⁶ Dr. Stuckmeyer indicated his rating was under DRE Category V for a combination of radiculopathy and loss of motion segment integrity.

Claimant's last day worked at respondent was July 31, 2012, as respondent could not accommodate her restrictions. Claimant was unemployed until May 16, 2013, when she accepted a position as a night shift house supervisor for Missouri Veteran's Home in Warrensburg. Claimant testified this is more of a supervisory position with lesser physical requirements than her job at respondent.

Claimant described her current symptoms:

I have chronic back pain, lower back pain, with a substantial amount on the right side that is constant. Pain in my left buttock that radiates down to above the knee on the left. It is – it's worse with sitting, it feels like I'm sitting on a golf ball. Worse with standing still and radiates around to the left hip and it's there all the time.⁷

⁴ Stuckmeyer Depo. at 22.

⁵ *Id.*, Ex. 3 at 2.

⁶ Stuckmeyer Depo. at 17.

⁷ Claimant's Depo. (Apr. 29, 2014) at 15.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-508(f) states, in part:

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

ANALYSIS

1. Should claimant's brief be stricken?

Respondent filed a Motion to Strike Claimant's Brief, stating claimant impermissibly integrated evidence and information into her brief that was not part of the record. With her brief, claimant included a clinical note dated August 6, 2012, from Dr. Harriet Shutter, the Board opinion in *Gilpin v. Lanier Trucking Co.*,⁸ and an IME report from Dr. Ciccarelli, related to the *Gilpin* case.

⁸ *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

K.S.A. 2012 Supp. 44-555c(a) states, in part: “The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.” The Board has held that the parties, absent a stipulation, are not entitled to supplement the record before the Board.⁹ The Board has specifically held that the record cannot be supplemented by attachments to a brief to the Board.¹⁰

The Board is free to hear arguments calling our attention to similarities in prior Board decisions. However, the Board will not consider any evidence outside of the record.

2. Was claimant’s work-related accident the prevailing factor in causing her injuries, medical condition, and resulting impairment?

The ALJ found, because Dr. Ciccarelli initially diagnosed SI joint strain, claimant’s injury was not the prevailing factor causing claimant’s L4-5 radiculopathy and impairment. The Board disagrees. Dr. Ciccarelli testified claimant’s work injury was the prevailing factor giving rise to the impairment, which was based upon L4-5 radiculopathy. Dr. Ciccarelli’s testimony in this regard is uncontroverted.

Dr. Stuckmeyer wrote in his report, “as a direct, proximate, and prevailing factor of the accident occurring on July 31, 2012, [claimant] sustained a significant injury to her lumbosacral spine.”¹¹ This opinion is also uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.¹²

Based on the testimony and written reports of both Drs. Ciccarelli and Stuckmeyer, claimant’s July 31, 2012, accident is the prevailing factor of her injuries, medical condition and resulting impairment to the low back.

3. What is the nature and extent of claimant’s impairment?

Dr. Ciccarelli opined claimant has a 10 percent impairment to the whole body as a result of lumbar radiculopathy resulting from her injury. Dr. Ciccarelli based his rating on the AMA *Guides*’ DRE category associated with radiculopathy. As noted above, Dr. Ciccarelli believes the impairment is the result of claimant’s July 31, 2012, accident.

⁹ *McMurray v. Western Resources, Inc.*, No. 247,669, 2002 WL 31602569, (Kan. WCAB Oct. 31, 2002).

¹⁰ *Piper v. A-1 Refuse*, No. 210,674, 1997 WL 803441, (Kan. WCAB Dec. 31, 1997).

¹¹ Stuckmeyer Depo., Ex. 3 at 2.

¹² See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

Dr. Stuckmeyer assigned a 25 percent whole body impairment rating for a combination of radiculopathy and a loss of motion segment integrity. Dr. Stuckmeyer's opinions regarding loss of motion segment integrity are controverted. Dr. Ciccarelli specifically testified claimant does not meet the AMA *Guides'* criteria for loss of motion segment integrity.

The Board gives more weight to the opinions of Dr. Ciccarelli. Dr. Ciccarelli was the authorized treating physician, provided preoperative care, performed the laminectomy and provided post-surgical care. As a practicing surgeon and, in this case, treating physician, Dr. Ciccarelli is in a better position to weigh the extent of claimant's impairment.

4. Is claimant entitled to future medical treatment?

Dr. Ciccarelli initially stated claimant did not need future medical treatment. At his deposition, he admitted it was not unusual for a patient to return after surgery for an epidural injection. He agreed claimant might need future injections related to this injury, depending on new imaging studies. He also agreed it would make sense to leave medical open. Dr. Stuckmeyer thought claimant would need future pain management, including epidural injections, due to claimant's persistent pain and radicular symptoms. It is more probable than not claimant will need medical treatment in the future related to her injuries.

CONCLUSION

Claimant's July 31, 2012, accident is the prevailing factor of her injuries, medical condition and resulting impairment to the low back. Claimant experiences a 10 percent impairment to the whole body as the result of her July 31, 2012 accidental injury. Claimant is entitled to seek future medical treatment upon proper application to the Director pursuant to K.S.A. 44-510k.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated June 23, 2014, is reversed.

The claimant is entitled to 33.71 weeks of temporary total disability compensation at the rate of \$570.00 per week or \$19,214.70 followed by 39.63 weeks of permanent partial disability compensation at the rate of \$570.00 per week or \$22,589.10 for a 10 percent functional impairment, making a total award of \$41,803.80. As of November 12, 2014, there would be due and owing \$40,043.64, which is ordered paid in one lump sum less amounts previously paid. The remainder is ordered paid at the rate of \$570.00 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of November, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Ronald L. Edelman, Attorney for Claimant
redelman@etkclaw.com
swhited@etkclaw.com

Kevin M. Johnson, Attorney for Respondent and its Insurance Carrier
kjohnson@wsabe.com

Kenneth J. Hursh, Administrative Law Judge